Supreme Court, U.S.
FILED

NO. 95 116 JUL 18 1995

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1995

DONNA WINTERS, an individual person,

Petitioners,

v.

COSTCO WHOLESALE GROUP BENEFITS PROGRAM and CONCEPT ADMINISTRATORS, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

LISH WHITSON
HELSELL, FETTERMAN, MARTIN, TODD & HOKANSON
1325 Fourth Avenue,
P.O. Box 21846,
Seattle, WA 98111
(206) 292-1144

Counsel for Petitioners

July 17, 1995

75 pp

I. QUESTION PRESENTED FOR REVIEW

A. Does the Rule of *Contra Proferentem*, Which Requires Ambiguities in an Insurance Policy to be Construed in the Insured's Favor and Which Courts Apply to State and Other Insurance Policies to Equalize Bargaining Power Between Insurers and Insureds, Apply to ERISA Insurance Plans, Particularly ERISA Insurance Plans that are Drafted by an Employer and Give the Employer Discretion to Interpret Ambiguous Plan Terms?

II. PARTIES

Donna Cole Winters was the plaintiff and respondent below, and is the petitioner here.

Costco Wholesale Group Benefits Program and Concept Administrators, Inc., were the defendants and appellants below, and are the respondents here.

III. TABLE OF CONTENTS

I. QUESTION PRESENTED FOR REVIEW i

II. PARTIES ii

III. TABLE OF CONTENTS iii

IV. TABLE OF AUTHORITIES vi

V. OPINIONS BELOW 1

VI. JURISDICTIONAL STATEMENT 1

VII. RELEVANT STATUTE 2

VIII. STATEMENT OF THE CASE 2

IX. REASONS FOR GRANTING THE WRIT 6

A. Introduction 6

B. The United States Circuits Sharply Disagree Regarding Whether and to What Extent *Contra Proferentem* Applies to ERISA Insurance Policies ... 7

1. The Seventh and D.C. Circuits Always Apply *Contra Proferentem*, Regardless of the Insurer's Identity or the Standard of Review 12

2. The Fourth and Eleventh Circuits Always Apply

Contra Proferentem Under De Novo Review, and Apply it Under Discretionary Review if the Administrator Suffers a Conflict of Interest 20

3. The Second and Fifth Circuits Apply *Contra Proferentem* but Only Under De Novo Review 30

4. The Eighth Circuit Maintains that ERISA Preempts Application of *Contra Proferentem*, yet Applies Contra Proferentem when Other Constructional Tools are Unavailing 38

5. The Ninth Circuit Applies *Contra Proferentem* Unless the Plan is Self-Funded and the Administrator has Discretion to Interpret Ambiguities 40

6. The Four Remaining Circuits Apply *Contra Proferentem* Where Review is De Novo, but have not yet Considered Whether to Apply it Where Review is for Abuse of Discretion or Where the Plan is Self-Funded 55

C. Failure to Apply *Contra Proferentem* to ERISA Insurance Policies Would Enable an Employer to Lull Employees with an Illusory Promise of Broad Coverage, Thereby Contravening the Legislature's Purpose, in Enacting ERISA, to Protect Employees from such Abuses 58

X. CONCLUSION 61

IV. TABLE OF AUTHORITIES

CASES

Allen v. Adage, 967 F.2d 695 (1st Cir. 1992) 56

Blair v. Metropolitan Life Ins. Co., 974 F.2d 1219 (10th Cir. 1992) 58

Brewer v. Lincoln Natl. Life Ins. Co., 921 F.2d 150 (8th Cir. 1990) 38

Brewer v. Protexall, Inc., 50 F.3d 453 (7th Cir. 1995) 14

Calhoun v. Complete Health Clinic, 860 F. Supp. 1494 (S.D. Alabama 1994) 25

Camelot Care Ctrs., Inc., v. Planters Lifesavers Co., 836 F. Supp. 545 (N.D. Ill. 1993) . 37, 50

Chambers v. Prudential Ins. Co. of America, 776 F. Supp. 1166 (S.D. Miss. 1991) 57

Costco Wholesale Corp. v. Winters, No. C92-581WD 1

Delk v. Durham Life Ins. Co., 959 F.2d 104 (8th Cir. 1992) 39

Doe v. Group Hospitalization & Med. Servs., 3 F.3d 80 (4th Cir. 1993) 21

Eley v. Boeing Co., 945 F.2d 276 (9th Cir. 1991) 37, 46, 52, 59

Everson v. Blue Cross & Blue Shield of Ohio, No. 93CV7534, 1994 U.S. Dist. LEXIS 14754 (N.D. Ohio June 15, 1994) 61

Finley v. Special Agents Mut. Ben. Assn., Inc., 957 F.2d 617 (8th Cir. 1992) 38

Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1988) 8, 61

Florence Nightingale Nursing Serv. v. Blue Cross/Blue Shield of Alabama, 41 F.3d 1476 (11th Cir. 1995) 25

Foster v. State Farm Mutual Insurance Plan, 843 F. Supp. 89 (W.D.N.C. 1994) 21, 23

Germany v. Operating Engrs. Trust Fund of Washington, D.C., 789 F. Supp. 1165 (D.C. 1992) 19

Glocker v. W.R. Grace & Co., 974 F.2d 540 (4th Cir. 1992) 20

Hammond v. Fidelity & Guar. Life Ins. Co., 965 F.2d 428 (7th Cir. 1992) 13

Hansen v. Continental Ins. Co., 940 F.2d 971 (5th Cir. 1991) 57

Heasley v. Belden & Blake Corp., 2 F.3d 1249 (3d Cir. 1993) 51, 56, 60

Hughes v. Boston Mut. Life Ins. Co., 26 F.3d 264 (1st Cir. 1994) 56

Kascewicz v. Citibank, N.A., 837 F. Supp. 1312 (S.D.N.Y. 1993) 32

Kunin v. Benefit Trust Life Ins. Co., 910 F.2d 534 (9th Cir. 1990)..... 6, 10, 40

Lee v. Blue Cross/Blue Shield of Alabama, 10 F.3d 1547 (11th Cir. 1994) 25

Masella v. Blue Cross & Blue Shield of Connecticut, 936 F.2d 98 (2d Cir. 1991) 30, 60

Maxa v. John Alden Life Ins. Co., 972 F.2d 980 (8th Cir. 1992)..... 38

McDuffey v. Michigan Conf., 872 F. Supp. 402 (E.D. Mich. 1994) 35

McNeilly v. Bankers United Life Assur. Co., 999 F.2d 1199 (7th Cir. 1993) 13

Meredith v. Allsteel, Inc., 11 F.3d 1354 (7th Cir. 1993) 14

Nettie Chauvin v. Texas Instruments, Inc., No. 91-2445, 1992 U.S. Dist. LEXIS 13683 (E.D. La. Sept. 9, 1992) 57

O'Neil v. Retirement Plan for Sal. Empl. of RKO, 37 F.3d 55 (2d Cir. 1992) 34

Pagan v. Plan, No. 94-7344, 1995 U.S. App. LEXIS 8460 (2d Cir. Apr. 12, 1995) 32

Phillips v. Lincoln Natl. Life Ins. Co., 978 F.2d 302 (7th Cir. 1992) 13, 61

Pitcher v. Principal Mut. Life Ins. Co., 870 F. Supp. 903 (S.D. Indiana 1994) 13

Ramsey v. Colonial Life Ins. Co. of America, 12 F.3d 472 (5th Cir. 1994) 57

Reed v. American Express Co., 863 F. Supp. 1572 (S.D. Fla. 1994) 25

Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983)..... 61

Springs Valley Bank & Trust Co. v. Carpenter, No. NA 91-94-C, 1993 U.S. Dist. LEXIS 20839 (S.D. Indiana Oct. 1, 1993)..... 14

Taylor v. Continental Group Change in Control Severance Pay Plan, 933 F.2d 1227 (3d Cir. 1991) 50, 52

Todd v. AIG Life Ins. Co., 47 F.3d 1448 (5th Cir. 1995) 57

Tolley v. Commercial Life Ins. Co., Nos. 92-6490, 92-6514, 1993 U.S. App. LEXIS 33508 (6th Cir. Dec. 17, 1993) 34

Winters v. Costco Wholesale Corp., 49 F.3d 550 (9th Cir. 1995) 1, 52

STATUTES

28 U.S.C. § 1254(1) 1

Employee Retirement Income Security Act, 29 U.S.C. § 1001 et seq 2, 61

OTHER AUTHORITIES

Mark Traynor, *Kunin v. Benefit Trust Life Insurance Co.: Protecting Employees Under ERISA by Construing Ambiguous Plan Terms Against the Insurer*, 77 Minn. L. Rev. 1219 (1993) 10

V. OPINIONS BELOW

Judge William Dwyer of the United States District Court for the Western District of Washington granted summary judgment for plaintiff Winters in an unpublished opinion. *Costco Wholesale Corp. v. Winters,* No. C92-581WD, July 26, 1993. Defendants Costco and Concept appealed to the United States Court of Appeals for the Ninth Circuit. A panel reversed. *Winters v. Costco Wholesale Corp.*, 49 F.3d 550 (9th Cir. 1995). The court denied Winters' request for rehearing en banc, against the recommendation of Judge Donald P. Lay.

VI. JURISDICTIONAL STATEMENT

This Court has jurisdiction under 28 U.S.C. § 1254(1).

VII. RELEVANT STATUTE

Employee Retirement Income Security Act, 29 U.S.C. § 1001 et seq.

VIII. STATEMENT OF THE CASE

After seven years of fruitless artificial reproduction treatments, Ms. Donna Winters conceived in December 1990 thanks to an *in vivo* procedure known as gamete intrafallopian transfer or "GIFT." Conception by GIFT takes place in the woman's fallopian tube.

As a participant in Costco's self-funded ERISA health insurance plan, Winters submitted a claim for the GIFT procedure. Costco, functioning as both insurer and plan administrator, denied her claim. It cited the policy's exclusion for *in vitro* fertilization, or "IVF" procedures (where conception

occurs in a petri dish), and a provision giving Costco discretion to interpret ambiguous or seemingly ambiguous plan terms.

Winters appealed Costco's decision, first because IVF and GIFT by definition are distinct procedures, and moreover because even if the exclusion were deemed ambiguous, the doctrine of *contra proferentem*, which applies to state and other insurance policies, requires coverage ambiguities to be construed in the insured's favor. The district court held for Winters on both points, but a Ninth Circuit Court of Appeals panel reversed.

Departing from a long line of precedent, the panel concluded Costco did not abuse its discretion in applying

the *in vitro* exclusion to Winters' *in vivo* procedure. It held that the rule of *contra proferentem* does not apply to self-funded ERISA plans which purport to give the plan administrator authority to determine benefit eligibility. The court declined to rehear the case en banc.

Winters asks this Court to review the panel's decision. If the scope of the IVF exclusion in Costco's insurance policy was ambiguous, it should have been construed in Winters' favor under the doctrine of *contra proferentem*.

This rule levels the playing field between insurer and insured. Leveling is required because an insured does not participate in the drafting process. *Contra proferentem* also fosters clear,

careful drafting, because it penalizes an insurer (who should be acting as a fiduciary in cases such as *Winters*) for ambiguities.

These effects are particularly desirable where, as here, the employer is both insurer and administrator and has discretion to interpret ambiguous plan terms. Failure to apply *contra proferentem* in such situations leaves the employer's conflict of interest unchecked.

As ERISA's main objectives are employee protection and clarity of coverage, Ms. Winters submits that *contra proferentem* supplements ERISA, and asks this court to hold that *contra proferentem* applies not only to state and other insurance policies but to

ERISA insurance policies as well. Moreover, review by this Court would resolve a multi-circuit divergence regarding the applicability of *contra proferentem* under ERISA, an issue that affects tens of millions of Americans covered by ERISA insurance plans.

IX. REASONS FOR GRANTING THE WRIT

A. Introduction

Contra proferentem applies without question to state and other insurance policies. *Kunin v. Benefit Trust Life Ins. Co.*, 910 F.2d 534, 538-39 (9th Cir. 1990), *cert. denied*, 498 U.S. 1013 (1990), *reh'g denied*, 498 U.S. 1074 (1991). The issue presented here is whether this long-standing constructional tool applies to ERISA insurance policies. The United States

Courts of Appeal are irreconcilably split on this issue. Moreover, even Courts of Appeal which apply *contra proferentem* to ERISA insurance policies sharply disagree as to whether it applies all the time or only under certain circumstances. The uniformity Congress sought in enacting ERISA does not exist under the current legal landscape. Ms. Winters asks this Court to resolve this circuit split and determine whether and to what extent *contra proferentem* applies to ERISA insurance plans.

B. The United States Circuits Sharply Disagree Regarding Whether and to What Extent *Contra Proferentem* Applies to ERISA Insurance Policies.

With the exception of the Ninth Circuit in *Winters*, all circuits apply

contra proferentem regardless of whether the plan is self-funded. With the exception of the Eighth Circuit, all circuits apply *contra proferentem* to ERISA insurance policies where the plan administrator does *not* have discretion. There is a multi-circuit divergence, however, on whether *contra proferentem* applies where the administrator *has* discretion. This divergence has its genesis in this Court's decision of *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1988).

At issue in *Firestone* was the appropriate standard of review for actions challenging denials of benefits based on plan interpretations. ERISA does not provide a standard of review in the statute. As a result, courts had

been using the arbitrary and capricious standard developed under the Labor Management Relations Act (LMRA). *Firestone, supra,* 489 U.S. at 109. Under this standard, courts defer to the administrator's interpretation unless it is unreasonable. 489 U.S. at 111.

The *Firestone* Court established a tripartite standard of review. Where the administrator has "discretionary authority to determine eligibility for benefits," the arbitrary and capricious standard (also known as the "abuse of discretion" standard) applies. 489 U.S. at 115. Where the administrator has discretionary authority, but operates under a conflict of interest (for example, because it is also the insurer, as in *Winters*), its decision is entitled

to somewhat less deference. *Id.* Where the administrator does not have such discretion, a de novo standard of review applies. *Id.*

After *Firestone,* federal courts began considering whether *contra proferentem* applies to ERISA insurance policies. The Ninth Circuit was the first to squarely address this issue, in the seminal decision of *Kunin v. Benefit Trust Life Ins. Co.,* 910 F.2d 534 (9th Cir. 1990), *cert. denied,* 498 U.S. 1013 (1990), *reh'g denied,* 498 U.S. 1074 (1991). Comment, Mark Traynor, *Kunin v. Benefit Trust Life Insurance Co.: Protecting Employees Under ERISA by Construing Ambiguous Plan Terms Against the Insurer,* 77 Minn. L. Rev. 1219, 1231 (1993). The *Kunin* court "carefully

considered" the *Firestone* decision, and "held that it did not abolish the rule of *contra proferentem* in ERISA cases." 77 Minn. L. Rev. at 1233.

Most circuits generally follow *Kunin*, and thus agree that *contra proferentem* applies to ERISA insurance policies. These circuits maintain that an administrator abuses its discretion by failing to interpret ambiguities in favor of the insured. Some circuits, however, reject application of *contra proferentem* where the standard of review is for abuse of discretion. These circuits believe application of *contra proferentem* is inconsistent with this highly deferential standard of review. The circuits thus are irreconcilably split regarding whether and to what

extent *contra proferentem* applies under ERISA. The following discussion details this circuit split.

1. The Seventh and D.C. Circuits Always Apply *Contra Proferentem*, Regardless of the Insurer's Identity or the Standard of Review.

The Seventh and D.C. Circuits always apply *contra proferentem* to ERISA insurance policies, even where the plan is self-funded and the plan administrator has discretion to interpret ambiguous terms. These Circuits reason that deferring to the administrator is not inconsistent with requiring the administrator to construe ambiguities in favor of the insured. Stated differently, it is an abuse of discretion, given the fiduciary

relationship between the administrator and the insured, to reject an insured's reasonable interpretation of an ambiguous policy term. In addition, the Seventh and D.C. Circuits apply *contra proferentem* to both third-party plans and self-insured plans.

For example, the Seventh Circuit applied *contra proferentem* to a third-party insurance plan under de novo review in *McNeilly v. Bankers United Life Assur. Co.*, 999 F.2d 1199, 1201 (7th Cir. 1993), *Phillips v. Lincoln Natl. Life Ins. Co.*, 978 F.2d 302, 311-12 (7th Cir. 1992), and *Hammond v. Fidelity & Guar. Life Ins. Co.*, 965 F.2d 428, 431 (7th Cir. 1992). *See also Pitcher v. Principal Mut. Life Ins. Co.*, 870 F. Supp. 903, 914 (S.D. Indiana

1994). In *Camelot Care Ctrs., Inc., v. Planters Lifesavers Co.*, 836 F. Supp. 545, 548 (N.D. Ill. 1993), also involving de novo review, *contra proferentem* was applied to a self-funded insurance plan. *Cf. Meredith v. Allsteel, Inc.*, 11 F.3d 1354, 1358 (7th Cir. 1993) (ERISA retirement plan, de novo review). In *Springs Valley Bank & Trust Co. v. Carpenter*, No. NA 91-94-C, 1993 U.S. Dist. LEXIS 20838 at *27 (S.D. Indiana Oct. 1, 1993), *contra proferentem* was applied to a third-party insurance plan under discretionary review. And in *Brewer v. Protexall, Inc.*, 50 F.3d 453 (7th Cir. 1995), also involving discretionary review, the court applied *contra proferentem* to a self-funded plan. 50 F.3d at 457, n8.

The *Brewer* case is particularly pertinent, since it involved the same type of plan and standard of review as in *Winters*.

Brewer began working at Protexall in October 1988. Six months later, he became eligible to enroll in Protexall's health insurance plan. Instead, he opted to retain the coverage he had through his previous employer. That coverage lapsed in June 1989. Brewer obtained temporary coverage through Time Insurance, and then joined the Protexall plan in September 1989. Protexall began deducting premiums from his paycheck at that time.

At the beginning of 1990, Brewer submitted $7986 in health insurance claims. Protexall refused to pay. It argued that Brewer was not covered by

its plan because he never provided proof of his good health when he enrolled. Brewer admitted that he did not provide such proof, but maintained the plan did not require him to do so. He cited a plan provision exempting employees from proving their good health if they "had comparable health coverage elsewhere which terminates. In this case, application for enrollment [could] be made within twenty (20) days of the other coverage termination date without submission of evidence of good health." 50 F.3d at 456.

Protexall responded that this exemption was not in effect when Brewer enrolled in September 1989. Rather, Protexall asserted, the exemption was part of an old plan that had been superseded. The court disagreed. The

new plan had not been executed until November 1990, and thus the twenty-day exemption still was effective when Brewer enrolled in September 1989. *Id.*

Protexall then asserted that Brewer did not qualify for the exemption, because his temporary Time policy was not "comparable . . . coverage." 50 F.3d at 456. The court again held for Brewer. It found that the term "comparable" was ambiguous, "[b]ecause the term is subject to more than one reasonable interpretation and because it is not clarified anywhere in the plan itself." 50 F.3d at 458. Because the term was ambiguous, and "[b]ecause at least one of the reasonable interpretations of 'comparable' include[d] Brewer's temporary policy," the court applied *contra proferentem* and

construed the term in Brewer's favor. *Id.*

The *Brewer* court reviewed the administrator's interpretation with the highest level of deference, because the administrator was a third party and therefore had no conflict of interest. 50 F.3d at 456, n2. *Contra proferentem* applied despite this highly deferential standard of review, the court reasoned, because

> the requirement of deference to a particular party's interpretation is not inconsistent with reliance on presumptions that might favor one or the other party. In other words, even if an administrator has discretion to construe the terms of a plan, the administrator can abuse its discretion by failing to apply the rule that ambiguities must be resolved in favor of the insured.

50 F.3d at 457, n8.

The District Court for the District of Columbia applied the same rationale to a self-funded ERISA insurance plan in *Germany v. Operating Engrs. Trust Fund of Washington, D.C.*, 789 F. Supp. 1165 (D.C. 1992). As in the *Brewer* case, the *Germany* court applied a highly deferential standard of review. 789 F. Supp. at 1167. Nevertheless, the court held, it is not inconsistent to defer to one party's interpretation yet apply a presumption in favor of another party. 789 F. Supp. at 1170. Therefore, "deference to an administrator's interpretation does not trump the long-standing rule of construction that ambiguities are resolved in favor of the insured." 789 F. Supp. at 1170.

2. The Fourth and Eleventh Circuits Always Apply *Contra Proferentem* Under De Novo Review, and Apply it Under Discretionary Review if the Administrator Suffers a Conflict of Interest.

The Fourth and Eleventh Circuits always apply *contra proferentem* under de novo review, and apply it under discretionary review if the administrator suffers a conflict of interest. These circuits have not addressed the applicability of *contra proferentem* under the highly deferential, arbitrary and capricious standard of review.

The Fourth Circuit first applied *contra proferentem* in *Glocker v. W.R. Grace & Co.*, 974 F.2d 540 (4th Cir. 1992). In *Glocker*, review was de novo

and the plan was not self-funded. Soon after *Glocker*, the Fourth Circuit applied *contra proferentem* under discretionary review, in *Doe v. Group Hospitalization & Med. Servs.*, 3 F.3d 80 (4th Cir. 1993), and in *Foster v. State Farm Mutual Ins. Plan*, 843 F. Supp. 89 (W.D.N.C. 1994). The *Doe* and *Foster* courts applied the lower level of deference, however, because the defendants in those cases operated under a conflict of interest. 3 F.3d at 87. The Fourth Circuit has not yet considered whether *contra proferentem* applies where there is no conflict of interest.

In *Doe*, the insured was diagnosed with blood cancer. Treatment required high doses of chemotherapy, which is

harmful to bone marrow. To avoid destruction of the patient's bone marrow, doctors prescribed an autologous bone marrow transplant. In this procedure, marrow is removed temporarily from the body and replaced after high-dose chemotherapy is completed. The insurance contract expressly covered chemotherapy; excluded, however, were transplants or "services . . . related to" transplants. 3 F.3d at 88.

Blue Cross argued this provision excluded coverage for *high*-dose chemotherapy, because "without the autologous bone marrow transplant, the high-dose chemotherapy could not be performed." *Id.* The court, relying on the principle of *contra proferentem,* held for the insured. It reasoned that

"in the absence of clear language, [the exclusion could not] be construed to withdraw coverage [that was] explicitly granted elsewhere in the contract." *Id.* Since the policy explicitly granted chemotherapy coverage, such coverage could not be withdrawn under the transplant exclusion.

The plan involved in *Doe* was not self insured. A Fourth Circuit district court, however, recently applied *contra proferentem* to a self-insured, discretionary plan in *Foster v. State Farm Mutual Insurance Plan,* 843 F. Supp. 89 (W.D.N.C. 1994). As in *Doe*, the court reviewed the administrator's decision under the arbitrary and capricious standard, but gave it less deference since the administrator

operated under a conflict of interest. 843 F. Supp. at 93.

The Eleventh Circuit, also recognizing that an administrator's conflict of interest affects the standard of review, has developed a unique, five-step plan interpretation process involving application of *contra proferentem*.

> First, a court must establish whether the claimant has proposed a "reasonable" interpretation of the plan under which he could be covered. If the plan grants the claims administrator discretion to interpret disputed provisions, however, the next step is to consider whether the claims administrator's interpretation was arbitrary and capricious. If the claimant has established a reasonable interpretation, then under contra proferentem, . . . the claimant's interpretation is taken as correct. Where no conflict of interest is present, a claims administrator's wrong but

> reasonable interpretation will not be found arbitrary and capricious. However, if a conflict of interest is established, the burden shifts to the administrator to prove that his or her interpretation of the plan was not tainted by self-interest.

Florence Nightingale Nursing Serv. v. Blue Cross/Blue Shield of Alabama, 41 F.3d 1476, 1481 (11th Cir. 1995) (self-funded plan), *cert. denied,* 115 S.Ct. 2002 (1995). *Accord, Lee v. Blue Cross/Blue Shield of Alabama,* 10 F.3d 1547, 1550 (11th Cir. 1994) (not self-funded); *Reed v. American Express Co.,* 863 F. Supp. 1572, 1576 (S.D. Fla. 1994) (self-funded); *Calhoun v. Complete Health Clinic,* 860 F. Supp. 1494, 1498 (S.D. Alabama 1994) (not self-funded). "[O]ne way an [administrator can] purge the taint of self-interest [is to]

prov[e] that its interpretation of its policy is calculated to maximize the benefits available to the plan participants and beneficiaries at a cost that the plan sponsor can afford." *Calhoun, supra,* 860 F. Supp. at 1500. Whether the plan is self-funded is not relevant to this five-step analysis.

For example, consider *Calhoun v. Complete Health Inc., supra.* Calhoun was a thirty-year-old woman with an aggressive form of breast cancer. Despite chemotherapy and a mastectomy, Calhoun's cancer persisted. Her doctor therefore recommended high-dose chemotherapy coupled with an autologous bone marrow transplant. Without this treatment, Calhoun's chance of survival was less than ten percent; with the

treatment, Calhoun's odds would be increased to greater than fifty percent. 860 F. Supp. at 1496, n4.

Complete Health denied preadmission approval for this treatment. It conceded Calhoun's chemotherapy was covered; it asserted, however, that the bone marrow transplant was excluded. Thus, Calhoun could have the chemotherapy, but not the transplant. Calhoun responded that Complete Health's interpretation completely eviscerated her chemotherapy coverage, because without the transplant, the chemotherapy would destroy her bone marrow, and thus kill her.

Following the Eleventh Circuit's five-step analysis, the court first considered whether Calhoun's interpretation of the plan was

reasonable. It determined that, because the transplant "is the support which makes high dose chemotherapy possible and, therefore, is part and parcel of the chemotherapy treatment," the scope of coverage was ambiguous. 860 F. Supp. at 1498. Therefore, *contra proferentem* applied, and dictated that the policy be interpreted in Calhoun's favor. 860 F. Supp. at 1499.

The next step was to determine the amount of deference to give Complete Health's interpretation. Complete Health had discretion to interpret plan provisions; however, it suffered from a conflict of interest, since it was both the insurer and the administrator. 860 F. Supp. at 1498. The burden thus shifted to Complete Health to prove its interpretation was not tainted by self-

interest. Complete Health did not satisfy this burden. The court therefore applied the less deferential standard of review, and found Complete Health's interpretation arbitrary and capricious.

First, the court determined that Complete Health "should not be allowed to deny coverage based on plan limitations which do not clearly and explicitly exclude that treatment." 860 F. Supp. at 1501. Second, the court found the administrator's decision making process was arbitrary and capricious.

> The only policy provision [the administrator] considered was that provision which excluded transplants. It appears that the sole issue . . . considered was whether or not [the high-dose chemotherapy and autologous bone marrow transplant] was a transplant and that no consideration was given

> to the contracts' chemotherapy . . . coverage."

860 F. Supp. at 1501. Calhoun's treatment therefore was covered.

3. The Second and Sixth Circuits Apply *Contra Proferentem*, but Only Under De Novo Review.

The Second and Sixth Circuits apply *contra proferentem* only where review is de novo. Unlike the Fourth, Seventh, Eleventh and D.C. Circuits, they believe *contra proferentem* is inconsistent with a deferential standard of review. These courts accord no significance to the insurer's identity, and thus apply *contra proferentem* to both third-party plans and self-insured plans.

The Second Circuit first applied *contra proferentem* in *Masella v. Blue Cross & Blue Shield of Connecticut*, 936

F.2d 98 (2d Cir. 1991). The standard of review was de novo. Blue Cross, the third-party insurer, refused to pay for the non-surgical treatment of Masella's temporomandibular joint dysfunction (TMJ). Blue Cross argued the treatment was "dental" rather than "medical" in nature, and therefore was excluded from coverage.

TMJ is a dysfunction of the temporomandibular joint rather than the teeth. "[C]ommonly used treatments for TMJ such as the . . . treatment given to Masella are similar to the treatment of joint problems elsewhere in the body and are primarily medical in nature." 936 F.2d at 105.

Nevertheless, Blue Cross contended that the "dental" exclusion referred to "'non-surgical services primarily

performed by dentists,' apparently without regard to whether or not the services relate to the teeth." 936 F.2d at 106. The court disagreed, holding that the "dental" exclusion "is defined by the nature of the procedure performed rather than by the title of the one who performs it." *Id.* Moreover, the court held, the principle of *contra proferentem* dictated the same result. 936 F.2d at 107. *Cf. Kascewicz v. Citibank, N.A.*, 837 F. Supp. 1312, 1318 (S.D.N.Y. 1993) (de novo review, ERISA retirement plan).

The Second Circuit did not consider the applicability of *contra proferentem* under arbitrary and capricious review until 1995, in the unpublished disposition of *Pagan v. Plan,* No. 94-

7344, 1995 U.S. App. LEXIS 8460 (2d Cir. Apr. 12, 1995). *Pagan* involved an employer-funded plan where the employer, NYNEX, had retained discretion to interpret the plan. The court noted NYNEX's potential conflict of interest, 1995 U.S. App. LEXIS 8460 at *12-13, but accorded no other significance to the plan's self-funded nature. Rather, it refused to apply *contra proferentem* on the ground that it is inapplicable under "the highly deferential arbitrary and capricious standard of review." 1995 U.S. App. LEXIS 8460 at *17.

Because *contra proferentem* did not apply, the court held that the plaintiff-insured could no longer collect disability payments for an injury allegedly sustained in an

automobile accident and for an asthmatic condition aggravated by smoking co-workers. Moreover, the court held, coverage was inappropriate since the insured could not prove she actually was injured in the automobile accident, and her office now was smoke free. 1995 U.S. App. LEXIS 8460 at *5-6. *Cf. O'Neil v. Retirement Plan for Sal. Empl. of RKO,* 37 F.3d 55, 61 (2d Cir. 1992) (arbitrary and capricious review, ERISA retirement plan).

The Sixth Circuit Court of Appeals has determined *contra proferentem* applies where review is de novo. *See Tolley v. Commercial Life Ins. Co.,* Nos. 92-6490, 92-6514, 1993 U.S. App. LEXIS 33508 at *6-7 (6th Cir. Dec. 17, 1993). It has not determined whether *contra*

proferentem applies under arbitrary and capricious review. The district court has done so, however, in *McDuffey v. Michigan Conf.*, 872 F. Supp. 402 (E.D. Mich. 1994). *McDuffey* involved an ERISA insurance plan that was the product of collective bargaining: the employees' union and the employer negotiated the plan terms.

McDuffey sought disability compensation. He had been injured in October, 1991. This injury necessitated amputation of his foot in June, 1992. Under the terms of the plan, "plaintiff was entitled to $10,000 if he suffered a 'loss' within 90 days after an accident. The plan defined the term 'loss' to mean 'severance.'" 872 F. Supp. at 409. Plaintiff argued these plan terms were

ambiguous, and that *contra proferentem* therefore applied.

The court, however, found that *contra proferentem* did *not* apply, because the standard of review was arbitrary and capricious, and the administrator's interpretation was rational. *Id.* Moreover, the plan was not ambiguous; since the plaintiff's severance occurred more than 90 days after an accident, his loss clearly was not covered. *Id.* And finally, the court held, *contra proferentem* "does not apply to plans that result from a collective bargaining agreement," because the rationale for its application – protecting an insured from terms he has been forced to accept on a take-it-or-leave-it basis – does not

exist in such situations. *Id.* *See also* *Eley v. Boeing Co.*, 945 F.2d 276, 279-80 (9th Cir. 1991). Rather, where the plan results from collective bargaining, the employee's union protects his interests during the bargaining process. *But see* *Camelot Care Centers, Inc. v. Planters Lifesavers Co.*, 836 F. Supp. 545, 549 (N.D. Ill. 1993) (even where the plan is the result of collective bargaining, "an insured participant . . . surely ha[s] no role . . . in the [bargaining] process. As between such an insured and the insurer, the doctrine [of *contra proferentem*] must apply with full vigor").

4. The Eighth Circuit Maintains that ERISA Preempts Application of *Contra Proferentem*, yet Applies *Contra Proferentem* when Other Constructional Tools are Unavailing.

Several Eighth Circuit decisions maintain that ERISA preempts application of *contra proferentem*, regardless of the insurer's identity or the standard of review. *See, e.g., Maxa v. John Alden Life Ins. Co.*, 972 F.2d 980, 985 (8th Cir. 1992) (de novo review, not self-insured), *cert. denied*, 113 S.Ct. 1048 (1993); *Finley v. Special Agents Mut. Ben. Assn., Inc.*, 957 F.2d 617, 619 (8th Cir. 1992) (de novo review, not self-insured); *Brewer v. Lincoln Natl. Life Ins. Co.*, 921 F.2d 150, 153 (8th Cir. 1990) (de novo review, not self-

insured), *cert. denied,* 501 U.S. 1238 (1991). In *Delk v. Durham Life Ins. Co.*, 959 F.2d 104 (8th Cir. 1992), however, the Eighth Circuit distinguished such decisions and applied *contra proferentem* to a self-funded ERISA insurance policy under de novo review. The *Delk* court held that in its other decisions, specifically *Brewer, supra,* resort to *contra proferentem* was not necessary because the language at issue was unambiguous. 959 F.2d at 105. Rather, the *Brewer* language was ambiguous only if accorded a specialized, as opposed to an ordinary, meaning. In the *Delk* case, in contrast, "the language remain[ed] ambiguous even after applying the approach in *Brewer.*" *Id.* Therefore, resort to *contra*

proferentem was appropriate since other constructional tools failed to cure the ambiguity.

5. Under *Winters*, the Ninth Circuit Applies *Contra Proferentem* Unless the Plan is Self-Funded and the Administrator has Discretion to Interpret Ambiguities.

The Ninth Circuit first considered *contra proferentem* in the seminal case of *Kunin v. Benefit Trust Life Ins. Co.*, 910 F.2d 534 (9th Cir. 1990), *cert. denied*, 498 U.S. 1013 (1990), *reh'g denied*, 498 U.S. 1074 (1991). Kunin and his family participated in a group health insurance policy issued to Kunin's employer by the Benefit Trust Life Insurance Company. Kunin incurred over $50,000 in medical bills for his

son's treatment for autism. Benefit Trust refused to pay $40,000 of these bills, arguing that Kunin's policy capped benefits for "mental illness or nervous disorders" at $10,000 per year. 910 F.2d at 535. The district court found that autism is not a mental illness, and that therefore the denial of benefits was arbitrary and capricious under the pre-*Firestone*, LMRA standard of review. 910 F.2d at 536. It ordered Benefit Trust to pay the claim in full. Benefit Trust appealed.

The court of appeals first determined the appropriate standard of review. *Firestone* had been promulgated in the interim, establishing the tripartite standard of review. For its analysis, the court applied the arbitrary and capricious standard, even

though Benefit Trust did not have the contractual discretion to interpret the plan. 910 F.2d at 537.

Next the court applied this standard to Benefit Trust's interpretation of "mental illness." Benefit Trust determined autism was a mental illness on the recommendation of Dr. Zolot, Benefit Trust's medical director. Dr. Zolot based his recommendation on "informal conversations with three psychiatrists, whose experience with autism [was] unknown, and . . . a textbook definition of autism." 910 F.2d at 535.

The court called Dr. Zolot's investigation an "altogether inadequate basis for determining autism to be a mental illness." 910 F.2d at 537-38. First,

> [t]he record [did] not indicate that the doctors with whom the medical director consulted had any significant experience with or particular expertise concerning autism. Moreover, the director made no effort to discuss the matter with [Kunin's son's] physicians, who later unequivocally testified that autism is not a mental illness. Additionally, the textbook definition Dr. Zolot relied on state[d] that although autism was previously thought to be "primarily psychiatric, it is now thought to be organically based." On its face, this definition contain[ed] no conclusions about whether autism should be classified as a mental illness. If anything, the fact that autism is no longer considered "primarily psychiatric" suggests that autism is not a mental illness.

910 F.2d at 539. The evidence adduced at trial confirmed the court's decision. Benefit Trust's denial of benefits therefore was arbitrary and capricious.

The court then held, in the alternative, that the term "mental illness" was ambiguous. It was not clear whether "mental illness" included autism, and the policy contained no definition or explanation the term even though it has "no precise or generally accepted definition." 910 F.2d at 541. Therefore, the term was construed in Kunin's favor under the doctrine of *contra proferentem*.

Benefit Trust countered that application of *contra proferentem* is inconsistent with *Firestone's* requirement of deference to the administrator's interpretation. The court disagreed, and held *contra proferentem* applicable even under an arbitrary and capricious standard of

review. It explained that Benefit Trust had

> misread *Firestone* because [it] failed to distinguish between (1) using certain presumptions, including presumptions in favor of a party, in order to arrive at the correct interpretation, and (2) deferring to a particular party's interpretation. Rejecting (2) obviously does not undermine the soundness of (1). We might say, for example, that a jury should not defer to a defendant's plea of "not guilty" – we want the jury to determine his guilt or innocence de novo. However, this in no way implies that the jury, in making this determination, is not required to presume innocence – and indeed, to presume it quite strongly. Again, we might say that a baseball umpire should not defer to a baserunner's claim that he is safe; but this proposition is fully consistent with the separate rule that ties go to the runner. Likewise, while we may not defer to an insured's construction, we must not fail to indulge in a presumption that ambiguous language favors the insured.

910 F.2d at 541.

The Ninth Circuit's next decision involving the application of *contra proferentem* decision was *Eley v. Boeing Co.*, 945 F.2d 276 (9th Cir. 1991). Eley participated in Boeing's self-funded ERISA health benefits plan. This plan was provided pursuant to collective bargaining agreements between Boeing and its employees. 945 F.2d at 277. King County Medical Blue Shield was the plan administrator.[1] As Blue Shield had

---

[1] The court did not decide whether Boeing could negate its conflict of interest by hiring a third-party claims administrator, determining that Boeing would prevail even under the less

discretionary authority to interpret the plan, the court applied the arbitrary and capricious standard of review. 945 F.2d at 278.

Shortly before Eley became covered under Boeing's health plan, she had a Pap test. The test results suggested Eley had cervical cancer. Shortly after she became covered under the plan, Eley had a biopsy confirming she had cancer. The cancer necessitated a hysterectomy, and Eley sought reimbursement for the cost of the operation.

Blue Shield denied her claim, arguing that Eley's cancer fell within the policy's preexisting condition exclusion. The plan defined

---

deferential, conflict of interest standard of review.

"preexisting condition" as "any illness . . . whether or not diagnosed, for which a person has received . . . a diagnostic test . . . during the three-month period before his or her coverage becomes effective." 945 F.2d at 279. Blue Shield interpreted "diagnostic test" to include Pap tests. *Id.* Eley argued that the term "diagnostic test" was ambiguous. She posited that "screening tests like the Pap test indicate the absence of disease while a diagnosis is defined as 'the art or act of recognizing the presence of disease.'" *Id.*

The court, however, held for Blue Shield, reasoning that although Pap tests technically detect the absence of disease, they are used to "recognize . . . the possible presence

of disease, therefore fitting within the definition of diagnosis." 945 F.2d at 279. Blue Shield's definition of "diagnostic test" therefore did not conflict with the plain language of the plan, and thus was not arbitrary and capricious. Moreover, because the term was not ambiguous, *contra proferentem* did not apply.

The court then listed several other reasons why *contra proferentem* did not apply. First, Boeing's plan, "unlike that in *Kunin,* [was] the result of a collective bargaining agreement." *Id.* Thus, the rationale for *contra proferentem* – to protect employees from an employer/insured who has had exclusive control of the drafting process and the take-it-or-leave-it

nature of the insurance relationship – was inapplicable. *But see Camelot Care Centers, Inc. v. Planters Lifesavers Co.*, 836 F. Supp. 545, 549 n5 (N.D. Ill. 1993) (even where the plan is the result of collective bargaining, "an insured participant . . . surely ha[s] no role . . . in the [bargaining] process. As between such an insured and the insurer, the doctrine [of *contra proferentem*] must apply with full vigor").

Second, Boeing's plan was self-funded. The court did not explain why it considered this relevant. It merely cited a Third Circuit case, *Taylor v. Continental Group Change in Control Severance Pay Plan*, 933 F.2d 1227 (3d Cir. 1991). *Taylor* involved application

of *contra proferentem* to an ERISA *severance pay* plan, as opposed to an ERISA *insurance* plan. When interpreting a *severance pay* plan, the court held, "a district court should attempt to determine its intended meaning without construing it in favor of any party. Only if this factual inquiry proves fruitless should a court resort to constructions in favor of one party or another." 933 F.2d at 1233. The *Taylor* court, noting that *contra proferentem* is "often strictly applied" in the insurance context, expressly *declined* to consider whether *contra proferentem* applied to ERISA *insurance* plans. *Id.* The Third Circuit later determined that it does. *Heasley v. Belden & Blake Corp.*, 2 F.3d 1249 (3d Cir. 1993).

The Ninth Circuit panel in *Winters v. Costco* built upon the *Eley* court's dicta and its misreading of *Taylor*. 49 F.3d 550 (9th Cir. 1995). Unlike *Kunin* and *Eley*, the *Winters* panel applied *Firestone's* middle standard of review: Costco, the employer, was also the plan administrator, so although it had discretionary authority to interpret the plan, it also had a conflict of interest, and therefore was not entitled to the highest level of deference. 49 F.3d at 552-53.

The panel first determined that Costco's interpretation of "in vitro" was not arbitrary and capricious because it did not "clearly conflict with the plain language of the plan." 49 F.3d at 553. The panel did not consider whether

Costco's investigation to determine the meaning of "in vitro" was arbitrary and capricious, even though the *Kunin* court expressly found arbitrary and capricious an investigation that was identical to Costco's investigation. Instead, the panel held that "[t]he abuse of discretion standard permits the district court to review only the evidence presented to the plan trustees." *Id.*

The panel then determined that the district court's application of *contra proferentem* was inappropriate. Relying on *Eley,* the panel declared that *contra proferentem* does not apply where the ERISA plan "(1) was the result of collective bargaining, and (2) was self-funded." 49 F.3d at 554. Here, the court reasoned, although the plan was

not the result of collective bargaining, it was self-funded, so *contra proferentem* did not apply. *Id.* Moreover, the panel declared, it is not proper to use *contra proferentem* where, as here, the plan grants the administrator discretion to interpret the plan. *Id.* To summarize, the panel stated, *contra proferentem* "is not applicable to self-funded ERISA plans that bestow explicit discretionary authority upon an administrator to determine eligibility for benefits or to construe the terms of the plan." 49 F.3d at 554.

It is not clear after *Winters* whether *contra proferentem* applies to self-funded plans that do *not* grant discretion to the administrator. Nor is

it clear what impact *Winters* has on *Kunin's* holding that *contra proferentem* applies under arbitrary and capricious review. ERISA law in the Ninth Circuit thus is uncertain. Employers do not know if adopting a self-funded plan is in their best interest, and employees do not know if avoiding a self-funded plan is in their best interest. Moreover, employees do not know if they can rely on the purported coverage of an insurance policy that grants discretion to the plan administrator.

6. The Four Remaining Circuits Apply *Contra Proferentem* Where Review is De Novo, but have not yet Considered Whether to Apply it Where Review is for Abuse of Discretion or Where the Plan is Self-Funded.

The First, Third, Fifth and Tenth Circuits remain. These circuits apply *contra proferentem* where review is de novo. None accords significance to the insurer's identity. All have yet to consider whether *contra proferentem* applies where review is for abuse of discretion.

In the First Circuit, *see Hughes v. Boston Mut. Life Ins. Co.*, 26 F.3d 264 (1st Cir. 1994) (de novo, not self-insured). *But cf. Allen v. Adage*, 967 F.2d 695 (1st Cir. 1992) (*contra proferentem* does not apply to ERISA severance pay plan).

In the Third Circuit, *see Heasley v. Belden & Blake Corp.*, 2 F.3d 1249 (3d Cir. 1993) (self-funded plan, applying *contra proferentem* to determine whether

plan granted discretionary authority to administrator, held, administrator had no discretion, therefore de novo review appropriate).

In the Fifth Circuit, *see Todd v. AIG Life Ins. Co.*, 47 F.3d 1448 (5th Cir. 1995) (de novo, not self-funded); *Ramsey v. Colonial Life Ins. Co. of America*, 12 F.3d 472 (5th Cir. 1994) (de novo, not self-funded); *Hansen v. Continental Ins. Co.*, 940 F.2d 971 (5th Cir. 1991) (de novo, not self-funded). *But see Nettie Chauvin v. Texas Instruments, Inc.*, No. 91-2445, 1992 U.S. Dist. LEXIS 13683 at *9-10 (E.D. La. Sept. 9, 1992) (*contra proferentem* inapplicable to ERISA insurance plan); *Chambers v. Prudential Ins. Co. of America*, 776 F. Supp. 1166, 1169 (S.D.

Miss. 1991) (same), *aff'd*, 947 F.2d 1487.

And in the Tenth Circuit, *see Blair v. Metropolitan Life Ins. Co.*, 974 F.2d 1219, 1222 (10th Cir. 1992) (de novo, not self-insured, interpreting an ERISA insurance policy in the insured's favor without resort to *contra proferentem* and without deciding whether it applies under ERISA, but rather on the basis of "basic trust principles that protect . . . the interests of the beneficiary-employee").

C. Failure to Apply *Contra Proferentem* to ERISA Insurance Policies Would Enable an Employer to Lull Employees with an Illusory Promise of Broad Coverage, Thereby Contravening the Legislature's Purpose, in Enacting ERISA, to Protect Employees from such Abuses.

There is a great need to protect insureds where the ERISA insurance policy is self-funded and the employer has retained discretion to interpret coverage ambiguities. Self-funded ERISA policies are drafted by employers; where such employers give themselves discretion to interpret coverage ambiguities, failure to apply *contra proferentem* creates a powerful incentive for some employers to draft ambiguous insurance policies. *Cf. Eley v. Boeing Co.*, 945 F.2d 276, 279 (9th Cir. 1991) ("if the employer is the administrator, a conflict [of interest] ordinarily exists"). This is because an employer can draft an ambiguous policy, and then at claim time construe ambiguities against coverage. Since employees may

interpret ambiguities broadly, and therefore not realize the limits of their coverage, their ability to accurately compare job alternatives is impaired. Thus, an employer's market incentive to provide competitive coverage disappears. In effect, employers have their cake and eat it too: they can lure quality employees with the promise of employer-provided insurance, yet avoid the cost of competitive insurance coverage. This result contravenes the remedial, protective purposes behind ERISA's enactment. *See Masella v. Blue Cross & Blue Shield of Connecticut, Inc.*, 936 F.2d 98, 107 (2d Cir. 1991). *See also Heasley v. Belden & Blake Corp.*, 2 F.3d 1249, 1257 (3d Cir. 1993); *Phillips v.*

Lincoln Natl. Life Ins. Co., 978 F.2d 302, 312-13 (7th Cir. 1992); *Everson v. Blue Cross & Blue Shield of Ohio*, No. 93CV7534, 1994 U.S. Dist. LEXIS 14754 at *14 (N.D. Ohio June 15, 1994), quoting *Masella, supra*. *Cf. Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 113 (1988); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983); 29 U.S.C. § 1001.

X. CONCLUSION

The *Winters* panel's failure to apply *contra proferentem* to a self-funded ERISA insurance policy where review is for abuse of discretion is contrary to state and other insurance law, the policies underlying ERISA, and the decisions of other Circuit courts.

Failure to apply *contra proferentem* is contrary to state and other insurance law because *contra proferentem* applies in all states, without question, to insurance policies which are not covered by ERISA.

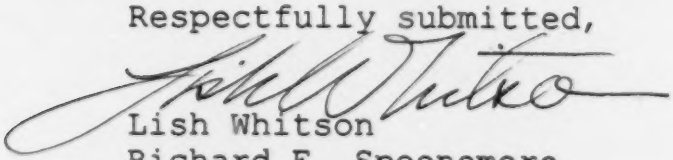
Failure to apply *contra proferentem* to ERISA insurance policies also violates the remedial, protective purpose of ERISA because such failure encourages ambiguous drafting. This is particularly true where the plan is self-funded, the employer is the drafter, and judicial review is based on abuse of discretion. In this situation, a certain kind of employer has a powerful incentive to draft policies as ambiguously as possible and thus lull employees with the illusory promise of

coverage. The promise is illusory because such an employer can construe ambiguities against coverage at claim time. Moreover, the employee is not able to protect himself or herself from limited coverage, because the employee is likely to assume ambiguities will be construed in the employee's favor. The employer thus has no market incentive to provide competitive insurance coverage.

Finally, the *Winters* panel's decision is contrary to decisions of other circuits. No other circuit accords significance to the identity of the insurer. Moreover, the circuits do not agree that *contra proferentem* is inapplicable where review is for abuse of discretion. Rather, two circuits apply *contra proferentem* regardless of

the standard of review; two circuits apply *contra proferentem* where the administrator suffers a conflict of interest; two other circuits apply *contra proferentem* only where review is de novo; one maintains that ERISA preempts *contra proferentem;* and the remaining circuits are undecided. This Court therefore should grant the petition for review to resolve the circuit split and determine whether and to what extent *contra proferentem* applies to ERISA insurance policies.

Respectfully submitted,



Lish Whitson
Richard E. Spoonemore
Yana D. Koubourlis
HELSELL, FETTERMAN, MARTIN,
TODD & HOKANSON
1500 Puget Sound Plaza
P.O. Box 21846
Seattle, Washington 98111
(206) 292-2244
Counsel for Petitioners